No. 11909

United States
CIRCUIT COURT OF APPEALS
For the Ninth Circuit

HAWAIIAN TRUST COMPANY, LIMITED,
Executor of the Will of Laura D. Sherman,
Deceased,
Appellant,

vs.

AGNES M. KANNE,
Executrix under the Will of Fred H. Kanne,
Deceased,
Appellee.

OPENING BRIEF FOR HAWAIIAN TRUST COMPANY, LIMITED, EXECUTOR OF THE WILL OF LAURA D. SHERMAN, DECEASED, APPELLANT

Upon Appeal from the District Court of the United States for the Territory of Hawaii

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JAMES M. RICHMOND,
Attorney for Petitioner.

ANDERSON, WRENN & JENKS,
Honolulu, Hawaii,
Of Counsel.

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STATEMENT SHOWING JURISDICTION

This is a civil action commenced in the United States District Court for the Territory of Hawaii by a citizen of the Territory of Hawaii by Complaint (Tr. p. 4-29) against Fred H. Kanne, Collector of Internal Revenue of the United States for the District of Hawaii for the recovery of income taxes paid, it being alleged in said Complaint that said taxes were illegally assessed and collected by defendant.

The defendant duly filed an answer (Tr. p. 31-33) to the Complaint. Thereafter defendant died and his executrix was substituted as defendant by order of the said Court on motion by plaintiff (Tr. p. 34-36). Then plaintiff died and her executor was substituted as plaintiff by order of the said Court on motion of the executor (Tr. p. 36-38). The United States District Court for the Territory of Hawaii had jurisdiction of the action under the Act of March 2, 1929, Chapter 488, Section 1, 45 Stat. 1475; U.S.C. Title 28, Section 41 (5). (Tr. p. 4-31). The United States Circuit Court of Appeals for the Ninth Circuit has jurisdiction of this appeal from the Judgment of Dismissal of the said United States District Court for the Territory of Hawaii (Tr. p. 52-53) under the provisions of U.S.C. Title 28, Section 225 (Judiciary Code, Section 128).

Appellant has filed a timely Notice of Appeal (Tr. p. 55), Bond for Costs on Appeal (Tr. p. 55-58), Designation of Record on Appeal (District Court) (Tr. p. 59), Statement of Points Relied Upon on Appeal (District Court) (Tr. p. 60-61), and Statement of Points to be Relied Upon and Designation of Record to be Printed (Circuit Court of Appeals) (Tr. p. 77-80).

STATEMENT OF THE CASE

(Note: The present plaintiff-appellant is the executor of the will of the deceased taxpayer plaintiff, Laura D. Sherman, and the present defendant-appellee is the executrix of the deceased collector defendant. For convenience and simplicity in stating and arguing the case, the deaths and substitution of parties will be ignored and the appellant will hereinafter be referred to as taxpayer or Laura D. Sherman.)

Under an agreement dated December 26, 1935, (Tr. p. 11-19) an irrevocable trust was created with George Sherman, husband of the taxpayer as Settlor, and Laura D. Sherman and the Hawaiian Trust Company, Limited, as trustees. Article I of the trust provides that the trustees shall pay to Laura D. Sherman, wife of the Settlor, during the remainder of her life all of the net income derived from said trust estate.

Frederick Dickson Nott, son of Laura D. Sherman, was divorced from Anna Adams Nott by a decree of divorce entered on April 28, 1936. (Pl. Exhibit A, Tr. p. 65-67). The decree ordered alimony of $100 per month for the divorced wife so long as she should remain unmarried, and in addition $75 per month each for the support and maintenance of Frederick Dickson K. Nott and Gretchen K. Nott (minor children of Frederick Dickson Nott and Anna Adams Nott) until the said minor children should have respectively achieved their majorities. The custody of the children was awarded to Anna Adams Nott.

By three separate documents dated April 16, 1936 (Tr. p. 19-25), Laura D. Sherman made assignments of $100 per month to Anna Adams Nott until death or remarriage, whichever is earlier, and of $75 per month for each of the minor children until the respective child's death or majority, whichever is earlier, out of the income to which Laura D. Sherman was entitled from the said trust. These assignments were made because Frederick Dickson Nott, son of the taxpayer, did not have sufficient income himself to pay the amounts awarded in said decree of divorce and because Laura D. Sherman desired to assist him financially. (Tr. p. 45-46). On April 16, 1936, the date of said assignments, Frederick Dickson K. Nott was approximately ten years of age, Gretchen K. Nott was appproximately nine years of age, Anna Adams Nott was approximately thirty-five years of age, and Laura D. Sherman was approximately sixty-seven years of age. (Tr. p. 46).

After the three assignments and pursuant thereto, the trustees paid the sum of $3000 per year to Anna Adams Nott out of the net income of the said trust and the balance of the net income was paid to Laura D. Sherman. (Tr. pp. 46, 69).

In her income tax returns for the calendar years 1940 and 1941 Laura D. Sherman returned the entire net income of the said trust as income to her. (Tr. p. 47-48). Subsequently claims for refund were made on the ground that the income to her from the said trust had been overstated in each year in the amount of $3000, such amount being the portion of the net income actually paid by the trustees to Anna Adams Nott pursuant to the three assignments. These claims for refund were rejected by the Commissioner of Internal

Revenue and this suit was instituted for the recovery of the alleged overpayments. (Tr. p. 48-49). The question here is whether all or any part of the income paid by the trustees to Anna Adams Nott by virtue of the said assignments during the years 1940 and 1941 is includable as part of the taxable gross income of taxpayer under the provisions of Sections 22(a), 161(a) and 162(b) of the Internal Revenue Code. Taxpayer contends that this in turn depends on whether the said assignments constituted a substantial disposition by the taxpayer of income producing property from which the income was derived. If it did, the income derived therefrom is no longer a part of the income of taxpayer under said provisions of the Internal Revenue Code.

The United States District Court for the Territory of Hawaii in its Special Findings of Fact and Conclusions of Law filed November 21, 1947 determined that the reversionary interest here of the taxpayer to the income assigned required the inclusion of the income assigned in the taxable gross income of the taxpayer. It is the contention of taxpayer that the said assignments were a substantial disposition of taxpayer's interest in the corpus of the trust and therefore that the taxpayer's ownership of the reversion is immaterial.

SPECIFICATION OF ERRORS

Specification of Error No. 1

The District Court of the United States for the District of Hawaii erred in making and entering its Special Findings of Fact and Conclusions of Law dated November 20, 1947, in the above cause.

Specification of Error No. 2

The District Court of the United States for the District of Hawaii erred in rendering and entering Judgment of Dismissal dated February 17, 1948, in the above cause.

Specification of Error No. 3

The evidence respecting the life expectancies of Laura D. Sherman, Anna Adams Nott, Frederick Dickson K. Nott and Gretchen K. Nott was relevant to show that the possibility of a reverter to Laura D. Sherman of the assigned interest was remote, and the District Court of the United States for the District of Hawaii erred in excluding as immaterial such evidence offered by the appellant. The evidence rejected was the facts respecting life expectancies contained in Paragraphs VIII, IX, X and XI of the Supplementary Stipulation and the grounds for objection are set forth in said stipulation in said paragraphs. Said evidence and objections are as follows:

"VIII.

"Said Anna Adams Nott, divorced wife of Frederick Dickson Nott, was born in Honolulu, Hawaii on April 28, 1901. On or about April 16, 1936 her age was approximately 34 years, 11 months. The Combined or Actuaries Experience Tables (printed in Wolfe, Inheritance Tax Calculations (2nd Ed.)) states that the life expectancy of a person of that age is 30.93 years. The American Experience Table of Mortality (printed in Wolfe, Inheritance Tax Calculations (2nd Ed.)) states that the life expectancy of a person of that age is 31.84 years. The defendant objects to the admissibility in evidence of information showing the life expectancy of Anna Adams Nott as of on or about April 16, 1936, on the ground that such information is immaterial and irrelevant to the issue involved in this proceeding.

"IX.

"Said Frederick Dickson K. Nott, son of said Anna Adams Nott, was born in Honolulu, Hawaii, on November 22, 1925. On or about April 16, 1936 his age was approximately ten years, five months. The Combined or Actuaries Experience Tables (printed in Wolfe, Inheritance Tax Calculations (2nd Ed.)) states that the life expectancy of a person of that age is 48.08 years. The American Experience Table of Mortality (printed in Wolfe, Inheritance Tax Calculations (2nd Ed.)) states that the life expectancy of a person of that age is 48.46 years. The defendant objects to the admissibility in evidence of information showing the life expectancy of Frederick Dickson K. Nott as of on or about April 16, 1936, on the ground that such information is immaterial and irrelevant to the issue involved in this proceeding.

"X.

"Said Gretchen K. Nott, daughter of said Anna Adams Nott, was born in Honolulu, Hawaii on December 27, 1926. On or about April 16, 1936 her age was approximately nine years, four months. The Combined or Actuaries Experience Tables (printed in Wolfe, Inheritance Tax Calculations (2nd Ed.)) states that the life expectancy of a person of that age is 48.80 years. The American Experience Table of Mortality (printed in Wolfe, Inheritance Tax Calculations (2nd Ed.)) states that the life expectancy of a person of that age is 49.14 years. The defendent objects to the admissibility in evidence of information showing the life expectancy of Gretchen K. Nott as of on or about April 16, 1936, on the ground that such information is immaterial and irrelevant to the issue involved in this proceeding.

"XI.

"Said Laura D. Sherman, mother of said Frederick Dickson Nott, was born on July 27, 1869. On or about April 16, 1936, her age was approximately 66 years 9 months. The Combined or Actuaries Experience Tables (printed in Wolfe, Inheritance Tax Calculations (2nd Ed.)) states that the life expectancy of a person of that age is 10.085 years. The American Experience Table of Mortality (printed in Wolfe, Inheritance Tax Calculations (2nd Ed.)) states that the life expectancy of person of that age is 10.13 years. The defendant objects to the admissibility in evidence of information showing the life expectancy of Laura D. Sherman as of on or about April 16, 1936, on the ground that such information is immaterial and irrelevant to the issue involved in this proceeding." (Transcript pp. 72-74)

Specification of Error No. 4

Each of the three assignments dated April 16, 1936, constituted a transfer of a portion of the equitable interest of Laura D. Sherman in the corpus of the trust dated December 26, 1935, and the District Court of the United States for the District of Hawaii erred in not so finding and deciding.

Specification of Error No. 5

Income paid to the assignees by virtue of said assignments was not taxable to Laura D. Sherman, and appellant is entitled to recover income taxes paid by Laura D. Sherman on account of said income, and the District Court of the United States for the District of Hawaii erred in not giving judgment for appellant accordingly.

Specification of Error No. 6

Each of the three assignments dated April 16, 1936 was a substantial disposition of the particular interest of Laura D. Sherman in the trust dated December 26, 1935, thus assigned, and the District Court of the United States for the District of Hawaii erred in finding and deciding that the income from such assigned interests was taxable to the assignor, of Laura D. Sherman.

Specification of Error No. 7

The reversionary interest of Laura D. Sherman in the interests transferred by the said three assignments was not substantial, particularly in relation to the interests transferred, and the District Court of the United States for the District of Hawaii erred in finding and deciding that the said reversionary interest was a substantial economic interest in the trust dated December 26, 1935.

Specification of Error No. 8

The District Court of the United States for the District of Hawaii erred in finding and deciding that the retention of the reversionary interest by Laura D. Sherman in the interests assigned by her as aforesaid required the inclusion in her taxable gross income of income paid to the assignees by virtue of the said assignments.

Specification of Error No. 9

The District Court of the United States for the District of Hawaii erred in finding and deciding that the facts of this case are controlled by the decision in *Harrison* v. *Schaffner*, 312 U.S. 79 rather than *Blair* v. *Commissioner*, 300 U.S. 5.

SUMMARY OF ARGUMENT

Blair v. *Commissioner*, 300 U.S. 5, 57 S. Ct. 330, establishes the rule that assignment of income by a life beneficiary of income from a trust is a transfer of income producing property, and that the income derived therefrom is taxable to the assignee and not the assignor. *Harrison* v. *Schaffner*, 312 U.S. 579, 61 S. Ct. 759, places a limitation on this rule to the effect that a transfer which does not involve a substantial disposition of a trust property will not be recognized as shifting the burden of the tax from the assignor to the assignee. The factors which, taken collectively, normally establish the substantiality or insubstantiality of such a transfer are: (1) The period of the transfer, (2) whether the transfer is used to discharge a legal obligation of the taxpayer, and (3) whether it is a device to avoid taxes. The transfers in the present case are substantial when tested on the basis of each and all of these factors.

ARGUMENT

Section 22(a) of the Internal Revenue Code provides that " 'Gross Income' includes gains, profits, and income derived from * * * * interest, rent, dividends, securities or the transactions of any business carried on for gain or profit, or gains or profits, and income derived from any source whatever." By Sections 161-(a) and 162(b) of the Internal Revenue Code, the tax is laid upon the income "of any kind of property held in trust", and the income of a trust for the taxable year which is to be distributed to the beneficiaries is to be taxed to them "whether distributed to them or not". There is no doubt but that the income here in question is taxable to the beneficiary. What must be determined is whether taxpayer remained the beneficiary of the trust with respect to the interests assigned. That she was not the beneficiary under the circumstances of the present case within the meaning of the Revenue Laws has been determined by decisions of the United States Supreme Court and other Federal courts.

It has been long established that the assignment of income alone, such as the assignment of compensation for services, etc. (see *Lucas* v. *Earl*, 281 U.S. 111, 50 S. Ct. 241; *Burnet* v. *Leininger*, 285 U.S. 136, 52 S. Ct. 345; *Helvering* v. *Horst*, 311 U.S. 112, 61 S. Ct. 144; and *Helvering* v. *Eubank*, 311 U.S. 122, 61 S. Ct. 149) leaves such income taxable to the assignor. On the other hand, when income producing property is assigned, the income from such property is no longer taxable to the assignor. In *Blair* v. *Commissioner,* 300 U.S. 5, 57 S. Ct. 330, it was held that the assignment by a life beneficiary of a trust of a portion of the income receivable by him *constituted a transfer of the beneficiary's equitable interest in the property of the trust* and accordingly the income was held taxable to the assignee and not taxable to the assignor. The particular facts of the *Blair* case are as follows:

In the *Blair* case the life beneficiary of a trust assigned to one daughter an interest in the trust amounting to $9000 out of the net income which the beneficiary was then or might be entitled to receive during his life. At about the same time like assignments of $9000 per annum out of the income of the trust were made to a second daughter and son respectively. In later years these chidren were assigned additional interests and to another son other specified interests in net income.

The Supreme Court pointed out:

> "The assignment of the beneficial interest is not the assignment of a chose in action but of the 'right, title and estate in and to property' " (p. 13-14 of 300 U.S.)

and concluded that:

> "the assignees thereby became the owners of the specified beneficial interests in the income, and that as to these interests they and not the petitioner were taxable for the tax years in question." (p. 14 of 300 U.S.)

The analogy of the present case to the *Blair* case is so close that unless the rule of the *Blair* case has been changed, the same result must logically follow.

Subsequent to the decision in the *Blair* case the Supreme Court decided *Helvering* v. *Clifford*, 309 U.S. 331, 60 S. Ct. 554. In that case a husband declared himself trustee of certain securities for the term of five years to pay to his wife the income accruing during that period but retained in himself the right to accumulate income and, with insignificant exceptions, complete control over the principal fund and the reversion of the corpus at the end of the term. The Supreme Court held, in short, that if the disposition of property is not substantial the tax authorities are justified in ignoring the disposition for tax purposes. It also held that such result was justified in that case.

With this background the case of *Harrison* v. *Schaffner*, 312 U.S. 579, 61 S. Ct. 759, was decided by the Supreme Court. In the *Schaffner* case the beneficiary of a trust executed irrevocable assignments of $84,000 of the net income of the trust *for the year* 1930 to three children and under another assignment about a year later, $54,000 of net income *of the year* 1931 to two of the same assignees and the surviving husband of the third. The court held the assignor taxable pointing out that (1) the "obvious purpose and effect" (p. 582 of 312 U.S.) of the assignment was the *avoidance of taxes;* (2) "that the gift by a beneficiary of a trust of some part of the income derived from the trust property for the period of a day, a month or a year involves no such substantial disposition of a trust property" (p. 582 of 312 U.S.) as to allow the assignor to escape the tax. The *Blair* case was distinguished on the ground that there there was a transfer of an "equitable interest in property for life effected by a gift for life of a share of the income of the trust" (p. 583 of 312 U.S.), while in the *Schaffner* case there was a "gift of the income or part of it for a period of a year" (p. 583 of 312 U.S.). The *Schaffner* case did not attempt to lay down a broad or general rule that assignors of income be taxable thereon. On the contrary, the hiatus between the *Blair* rule and the *Schaffner* rule was emphasized in the words,

> "* * * * * we leave it to future judicial decisions to determine precisely where the line shall be drawn between gifts of income producing property and gifts of income from the property of which the donor remains the owner, for all substantial and practical purposes. Cf. *Helvering* v. *Clifford*, Supra." (p. 583-4 of 312 U.S.)

It is clear from both the *Blair* and *Schaffner* cases that after the assignment of income producing property the income therefrom is no longer taxable to the assignor. However, the *Schaffner* case suspends the application of this rule pending the determination of whether the particular assignment of the beneficial interest in the trust is one which results in a substantial transfer of income-bearing property. If the assignment is found to have resulted in a substantial transfer of income-bearing property, the income therefrom is no longer taxable to the assignor. This determination, as illustrated by the *Blair*, *Clifford* and *Schaffner* cases and succeeding cases hereinafter referred to, turns upon several conditions, none of which alone is necessarily determining but which when taken collectively provide the basis for characterizing the transfer as substatial or insubstantial, as effective or non-effective and finally concluding upon whom the burden of tax will fall. These conditions or determining factors for the most part are as follows: (1) The period of the transfer, (2) whether the income assigned is used to discharge a legal obligation of the taxpayer, and (3) whether it is a device to avoid taxes.

In the matter of period of transfer, three cases have involved assignments for a single year:. *Huber* v. *Helvering*, 117 F. (2d) 782 (Court of Appeals, D.C.) decided prior to *Schaffner*, *Schaffner*, and *Hyman* v. *Nunan*, 143 F. (2d) 425 (CCA-2), decided subsequent to Shaffner. These cases held the income taxable to the assignor. Two cases decided subsequent to *Schaffner* which have involved assignments for longer than a single year have held the assignee taxable and the assignor not. Thus, in *Mahaffey* v. *Helvering*, 140 F. (2d) 879 (CCA-8), the beneficiary assigned trust income to his mother, then 76, for her life, and in *Belknap* v. *Glenn*, 55 Supp. 631 (D.C. W.D. Ky.), where the assigment was for life. Of the assignments made by Laura D. Sherman, one is to the assignee for life or until remarriage, and two are for periods of approximately ten and eleven years being until the children reach majority, or until their prior deaths. That the assignments may terminate prior to the deaths of the assignees is not significant in the present case since by the terms of the instrument such determination is upon contingencies *beyond any control of the assignor*. The assignments made by Laura D, Sherman have nothing in common with the assignments in the *Huber*, *Schaffner*, and *Hyman* cases, so far as the time factor is concerned. The periods of her assignments illustrate the difference in her purpose from the purposes of the assignments in those cases.

This is especially true in view of the respective ages of Mrs. Sherman, Mrs. Nott and the two children at the time of the assignments. With respect to the $100 assignment for the life of Anna Adams Nott, Mrs. Sherman was approximately 67 and Mrs. Nott was approximately 35 at the time of the assignment. It is obvious that all reasonable persons would expect Mrs. Nott to outlive Mrs. Sherman and expectancy tables would of course have borne this out. Accordingly that assignment was for all practical purposes the equivalent of an assignment for the life of Mrs. Sherman, thus demonstrating the closeness of the analogy to the *Blair* case. With respect to the assignments for the benefit of the two children, the transfers were for periods of over ten and eleven years respectively. At age 67 it was to be expected that this was approximately the life expectancy of Mrs. Sherman so that again for practical purposes it was the substantial equivalent of a transfer for the life of Mrs. Sherman, and, of course, expectancy tables would again have pointedly demonstrated this fact. There is no implication that the technical possibility of reversion to Mrs. Sherman was retained by her for the purposes of control. The periods of the assignments were tailored to fit exactly the requirements of the said divorce decree. In the *Schaffner* case the implication was strong from the facts that the assignor was attempting to control and yet avoid taxes according to her annual convenience. Can it fairly be said that Mrs. Sherman's assignments can be similarly characterized?

Further with respect to the period of the transfer, can a period of ten years be characterized as of short duration? In the *Clifford* case the term was five years accompanied by many other factors not present here. On the other hand, the income of a ten year trust has been held to be not taxable to the grantor. *Commissioner* v. *Jonas*, 122 Fed (2d) 169 (CCA-2).

With respect to the factor of whether the income was used to discharge a legal obligation of the assignor, it is clear that Mrs. Sherman had no legal obligation to provide for the support and maintenance of her son's children or to pay alimony to his divorced wife.

No lengthy explanation is necessary to point out that the present assignment was not an attempt to evade taxes, and the District Court found accordingly. (Tr. p. 46). It was a well intentioned effort to assist a financially embarrassed son to meet his alimony obligations (Tr. p. 45-46, 39-40); a highly practical solution to a practical problem other than tax savings.

That the rule of the *Blair* case is still good law cannot be disputed as it has been followed in subsequent cases such as *Belknap* and *Mahaffey*, and the Supreme Court paid homage to it in deciding the *Schaffner* case.

The closest case on its facts to the present case since the decision in the *Schaffner* case is *Leonard Farkas* v. *Commisioner*, 8 T.C. 1351. The decision in this case was against the taxpayer, but there was a strong dissent in the Tax Court and an appeal is presently pending before the United States Circuit Court of Appeals for the Fifth Circuit. In the *Farkas* case, the taxpayer was the recipient for life of one-eighth of the income of a trust created by his father. Taxpayer assigned his right to receive the income of this trust to his brother in trust to distribute the same among various named relatives. The assignment was for a period of ten years, or until the prior death of the brother. Taxpayer was fifty-three years old at the time, the brother fifty-eight. The Tax Court held in effect that only an assignment of the income for the life of the taxpayer would result in this income being taxed to the assignee, the retention of any reversionary interest in the assignor being sufficient to bring the case within the rationale of the *Schaffner* case. The dissent (8 T.C. at pp. 1358-1359) in the *Farkas* case recognized this fallacy, as follows:

> "ARUNDELL, J., dissenting: As in *Blair* v. *Commissioner*, 300 U.S. 5, the petitioner here was a life beneficiary of a testamentary trust. That gave him an equitable interest in the corpus. See also *Irwin* v. *Gavit*, 268 U.S. 161. His equitable interest in the corpus, in the absence of a valid restraint upon alienation, was assignable in whole or in part. Here, as in *Blair*, the petitioner assigned a part of his interest to others, though here, through the medium of a second trust; and a state court has held the assignment valid. (Indeed, if it had been otherwise, the petitioner's interest would have been forfeited according to the express terms of his father's will, and then there could be no basis whatever for taxing the income to him.)
>
> "In such a case, as distinguished from the assignment of compensation for services, past, present, or future, *Blair* holds that the taxation of income is predicated upon ownership of the property; hence the tax falls on the assignee. Thus it would seem that, in the absence of a change in the rule, the analogy of the instant case to *Blair* is

so close that the result logically should be the same.

"We know, however, that the impact of *Helvering* v. *Clifford*, 309 U.S. 331, has forced a modification of the rule with respect to the taxation of income from property; in short, if the disposition of the property is not substantial, the income will be taxed as if no disposition at all had been made. It is therefore necessary to evaluate the present case with that principle in mind, for it can not be doubted that the intervening *Clifford* decision very largely influenced the result in *Harrison* v. *Schaffner*, 312 U.S. 579. The rationale of both cases is much the same. *Schaffner* holds that the 'gift by a beneficiary of a trust of some part of the income derived from the trust property for the period of a day, a month, or a year involves no such substantial disposition of the trust property' as to allow the donor to escape the tax.

"Tested in the light of the *Clifford* principle, can it fairly be said that the petitioner has not made a *substantial* disposition of his interest in the trust property? Unlike *Clifford*, petitioner did not make himself the trustee, but chose an independent trustee. Neither did he retain any powers or control over the property. He was a bachelor and was in no way obligated to support the benefiiciaries of the trust—his adult brothers and sisters and their children. Nor did he and the beneficiaries comprise either an intimate family group or one economic unit. Finally, it is clear that the mere nonmaterial satisfaction of making gifts to his brothers and sisters is not alone sufficient to require taxing the income to him. *Helvering* v. *Stuart*, 317 U.S. 154.

"It is obvious that the only *Clifford* factor present in this case is the 'short duration of trust'—there five years, here ten. But I know of no case

> where, that being the only factor present, any court has held the income of a ten-year trust taxable to the grantor. The respondent has cited none. On the other hand, the Second Circuit held exactly the contrary in *Commissioner* v. *Jonas*, 122 Fed. (2d) 169.
>
> "The conclusion of the majority that this case is controlled by *Schaffner* extends the scope of that case beyond anything I think the Supreme Court there decided or intended, and it makes of *Blair* practically a nullity. I respectfully dissent.
>
> "VAN FOSSAN, BLACK, and LEECH, JJ., agree with this dissent."

All the errors specified stem from a fundamental misconception of the holding in the *Schaffner* case. The District Court apparently proceeded on the theory that the *Schaffner* case laid down a broad rule which requires that assignors of trust income be taxable thereon if the assignor retains a reversionary interest in the property assigned. Particular emphasis was laid on the termination of the assignments on the contingencies of death or remarriage, and in line with the same thinking, evidence concerning life expectancies which pointedly demonstrated the substantiality of the transfers was excluded as immaterial.

Summing up our argument as to the errors of the Court below the law is clear and undisputed that where there is an effective assignment of income producing property, the income therefrom is not taxable to the assignor. The assignments here were *substantial* dispositions within the rationale of the *Clifford, Schaffner* and other cases and therefore effective as such. Consequently, Laura D. Sherman in assigning stipulated sums of income payable from the income of the trust to the assignee, effected an assignment of rights in and to the corpus of the trust under the *Blair* rule and as to the income derived from these beneficial interests, the assignees are taxable and Laura D. Sherman is not. Therefore, Laura D. Sherman overpaid her income taxes for the years 1940 and 1941 and her executor is entitled to recover the amount thus overpaid.

It is requested that the Judgment of Dismissal of the United States District Court for the Territory of Hawaii be reversed and set aside, and that court directed to enter judgment for plaintiff accordingly.

Respectfully submitted,

James M. Richmond,
Attorney for Appellant,
Hawaiian Trust Company, Limited,
Executor of the Will of Laura
D. Sherman, Deceased.